No. 09-729

Supreme Court, U.S.
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In The
Supreme Court of the United States

CARL MELVIN TOWNES,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES
Chief Deputy
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Commonwealth of Virginia

February 19, 2010

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Did the court below err in concluding that the decision of the state court was neither contrary to, nor an unreasonable application of, clearly established precedent from this Court when the petitioner alleged no facts supporting the contention that the Virginia Parole Board intentionally discriminated against him on the basis of race?

Is there a division among the circuits on the proper pleading standard in intentional discrimination cases?

Is this case moot when the petitioner attacked a finding that he was ineligible for discretionary parole, but he was released on mandatory parole during the pendency of the appeal?

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Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of the Commonwealth of Virginia, submits this Brief in Opposition to the Petition for Certiorari.[1]

INTRODUCTION

The petitioner purports to identify a division among the circuits with respect to complaints filed under Rule 8 of the Rules of Civil Procedure alleging intentional discrimination. Even if such a division exists, the distinct pleading rules that apply in the habeas context render this case a wholly inappropriate vehicle to reach the issue. Moreover, upon examination, the supposed split in the circuits evaporates. Dicta from one circuit does not constitute a proper division worthy of this Court's review. Finally, the fact that the case is moot and utterly lacking in merit further counsel against granting certiorari.

STATEMENT OF THE CASE

1. Over a span of ten days in 1991, Carl Melvin Townes robbed three Richmond area fast-food restaurants at gunpoint. Pet. App. 34a-35a. He was

[1] On December 29, 2009, this Court extended the time for filing a response to February 22, 2010.

convicted in three separate courts of three counts of robbery and two counts of use of a firearm in the commission of robbery. Pet. App. 34a-35a. In one of Townes's cases, he pled guilty to the robbery in exchange for which the prosecution agreed to drop the attendant firearm charge. Pet. App. 2a. He was sentenced to serve a total active sentence of 32 years. Pet. App. 36a.

2. After the Virginia Department of Corrections determined that Townes was not eligible for parole,[2] Townes appealed to the Virginia Parole Board. Pet. App. 48a. The Parole Board affirmed the decision and deemed him "ineligible for parole." Pet. App. 48a. Townes filed a petition for a writ of habeas corpus in the Supreme Court of Virginia, invoking that Court's original jurisdiction. He alleged, among other things, that the Virginia Parole Board violated his equal protection rights by discriminating against him because of his race. Pet. App. 3a. The court denied the petition, dismissing it as frivolous. Pet. App. 49a.

3. Townes then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of

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[2] Under *Virginia Code* § 53.1-151(B1), "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole."

Virginia. Pet. App. 33a. The district court described one of Townes's two claims as follows:

> His crimes were part of a "common scheme" and should have been treated as one offense, rather than three separate offenses. The Virginia Parole Board violated the Equal Protection Clause when it classified a white female's eight-day escapade involving four armed robberies with a broken or toy pistol as one scheme, but classified Mr. Townes's three robberies over approximately 10 days as three separate offenses.

Pet. App. 37a. In support of this allegation, he attached a newspaper article detailing the fact that a white woman named Sue Kennon was released on parole. The newspaper describes that Kennon committed "four armed robberies with a broken or toy pistol." Federal Hab. Pet., Exhibit D. It is not clear whether he attached this article to his state habeas petition. Townes requested that the district court "grant the Petitioner to be eligible for parole consideration;" "Grant the Petitioner a parole hearing;" "ORDER . . . The Board to grant Petitioner a parole; and . . . " "Any other relief that the court may deem to be proper and just." Memorandum in support of Federal Hab. Petition, unpaginated.

The district court, like the Supreme Court of Virginia, found the claim frivolous. Pet. App. 42a. The court observed that "Mr. Townes has failed to proffer even a factual basis to suggest that the Virginia Parole Board violated Mr. Townes's rights, nor has he

provided any showing that the Virginia Supreme Court's decision involved an objectively unreasonable application of federal law." Pet. App. 42a. The court noted that Townes "has failed to adduce facts sufficient to state a claim of discriminatory treatment in violation of the Fourteenth Amendment because he has not asserted that he was similarly situated to any other prisoner for the purposes of determining parole eligibility." Pet. App. 43a. Townes had not provided any additional facts concerning the robberies perpetrated by "a white female from an affluent area." Pet. App. 43a. Because "Townes provides neither additional information to show his crimes were part of a common scheme nor does he provide enough detail about Ms. Kennon's crimes to allow a thorough comparison between these two parole eligibility determinations." Pet. App. 44a. The district court dismissed the petition on August 22, 2005. Pet. App. 46a.

4. Townes appealed to the United States Court of Appeals for the Fourth Circuit. While the appeal was pending, Townes was released on mandatory parole.[3] The Fourth Circuit first concluded that the appeal was not moot, notwithstanding Townes's release on mandatory parole. The court reasoned that "the parole ineligibility finding still may affect the length of his parole." Pet. App. 5a. Therefore, Townes had shown an injury in fact. Pet. App. 5a.

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[3] *See Virginia Code* § 53.1-159.

Furthermore, the court concluded that the Parole Board's initial ineligibility finding "precludes Townes from an opportunity to obtain a shortened period of parole" and, consequently, causation was present. Pet. App. 6a. Finally, the court held that Townes's claim was redressable because, were he to prevail, he would obtain a hearing before the Parole Board and possibly obtain a shorter period of parole. Pet. App. 4a-10a.

The court next turned to the merits of the claim. The court observed that "when a state court has adjudicated a habeas claim on the merits . . . the petitioner must allege facts sufficient to meet the exacting standard set forth in 28 U.S.C. § 2254(d). Pet. App. 14a. The court assumed that Townes had pled "facts sufficient to satisfy the first element of an equal protection claim—unequal treatment of similarly situated persons." Pet. App. 16a. However, Townes "failed to allege facts sufficient to satisfy the second element of such a claim—intentional discrimination." Pet. App. 16a. A petitioner must allege "that the state intended to discriminate against him." Pet. App. 17a. Townes alleged none of the factors that are probative of a discriminatory intent by the decisionmaking body, such as a consistent pattern of discrimination, a history of discrimination, a specific sequence of events leading up to the finding of ineligibility or contemporary statements by Parole Board members manifesting intentional discrimination. This failure to allege any facts

regarding the Parole Board's discriminatory motive was fatal to his claim. Pet. App. 18a.

One member of the panel dissented on the basis that the petition was moot. Pet. App. 19a-32a. The dissent argued that nothing supported the conclusion that Townes's injury—a finding of ineligibility for discretionary parole—could be remedied by the court. Pet. App. 19a-20a. The mere possibility that the parole board would shorten his current term of parole is not redressable, the dissent reasoned, because the standard for redressability is that a decision in his favor would "likely" remedy the injury. Pet. App. 26a. The dissent noted that the decision of *parole ineligibility* was based on the fact that Townes had three qualifying convictions, which precluded discretionary parole. Pet. App. 30a. In contrast, a decision to *shorten parole* is based on separate criteria, including the best interests of society. Pet. App. 30a. The dissent observed that there was no evidence in the record to support the conclusion that the Board would be likely to shorten Townes's parole if the initial decision of parole ineligibility were proved erroneous, or even that the Parole Board would consider the initial parole ineligibility determination at all. Pet. App. 31a.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for four reasons. First, Habeas petitions are governed by distinct and more demanding rules than civil complaints. Therefore, assuming a conflict exists with respect to what a petitioner must allege under Rule 8 of the Federal Rules of Civil Procedure to survive a motion to dismiss, that conflict cannot be resolved in the habeas context.

Second, no conflict exists. The petitioner can only point to one decision that clearly indicates a court of appeals believes this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) is no longer good law in light of this Court's more recent decisions interpreting Rule 8, and that court indicated its belief in dicta. No Court has squarely held that *Swierkiewicz* is no longer good law.

Third, this case is moot. The petitioner has already received the relief requested in his petition: he was released on parole during this appeal. The petitioner's ability to secure any further relief amounts to nothing more than speculation. This Court will not provide advisory opinions on moot questions.

Finally, as a matter of habeas corpus practice, the petitioner did not demonstrate any intent to discriminate.

I. THE DISTINCT PLEADING RULES THAT APPLY IN THE HABEAS CONTEXT RENDER THIS CASE A POOR VEHICLE FOR RESOLVING NOTICE PLEADING ISSUES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

The petitioner presents this case as an "ideal vehicle" for resolving purported tension between two lines of cases interpreting Rule 8 of the Civil Rules of Procedure. Pet. 24. Federal habeas review of state convictions, however, operates by different rules. Instead of the "notice pleading" of Rule 8, Rule 2(c) of the rules governing § 2254 proceedings applies, and it requires a habeas petitioner to "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground."

As this Court noted in *Mayle v. Felix*, 545 U.S. 644, 655 (2005):

> Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L. Ed. 2d 80 (1957).
>
> Habeas Corpus Rule 2(c) is more demanding. It provides that the petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." See also Advisory Committee's Note on subd. (c) of Habeas Corpus Rule 2, . . . ("In the past, petitions have frequently

> contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important. . . ."); Advisory Committee's Note on Habeas Corpus Rule 4, . . . ("'[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (internal quotation marks omitted)).

There are several reasons for this divergence between ordinary civil cases and habeas cases. For one thing, the reviewing court is not assessing a claim in a vacuum; there is an existing court record that forms the backdrop for review of the habeas claims. The petitioner, of course, has a right to attend his own trial and to consult with his attorney. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (right to be present at trial); *Johnson v. Zerbst*, 304 U.S. 458, 467-69 (1938) (right to confer with counsel). Moreover, the habeas petitioner has a right to demand his attorney's file at the conclusion of the case. *See* Va. R. Prof. Conduct 1:16(e) (specifying that the client has a right to the file, even if the client has not paid the attorney's fee). A regime of notice pleading followed by automatic discovery would be inappropriate for inmate litigants who constantly abuse the criminal justice system. *See Jones v. Bock*, 549 U.S. 199, 203 (2007) (noting that most prisoner cases have "no merit" and "many are frivolous").

Unlike a Rule 8 complaint, the allegations in a § 2254 petition must clear the hurdle imposed by the

Anti-Terrorist and Effective Death Penalty Act. To overcome this hurdle, a habeas petitioner seeking federal review of his state conviction also must state sufficient allegations to demonstrate that the state court decision under review was contrary to, or an unreasonable application of, clearly established precedent from this Court, or the state court's decision was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). *See Williams v. Taylor*, 529 U.S. 362, 405-13 (2000).

Strikingly, the petitioner does not even acknowledge that habeas operates under a different set of pleading rules. In *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 (2002), this Court framed the issue as follows:

> This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" Fed. Rule Civ. Proc. 8(a)(2).

This Court did not (and had no occasion to) address in *Swierkiewicz* what a petitioner seeking federal habeas review of his state conviction must plead in his

habeas petition if the petitioner claims intentional discrimination at the hands of a State. Nor can the Fourth Circuit's decision in this case be construed as addressing any arguable tension between *Swierkiewicz* and more recent decisions construing Rule 8 of the rules of Civil Procedure.

All the cases the petitioner relies on in support of the existence of a circuit split are Rule 8 cases, not habeas cases.[4] Even assuming the existence of a split, given the distinct pleading rules that apply to habeas cases and Rule 8 cases, this is not the proper vehicle to resolve the split.

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[4] *See Boykin v. KeyCorp*, 521 F.3d 202 (2nd Cir. 2008) (complaint alleging violations of Fair Housing Act and other statutes); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3rd Cir. 2009) (employment discrimination claim under the Rehabilitation Act); *Lindsay v. Yates*, 498 F.3d 434 (6th Cir. 2007) (Rule 8 complaint alleging violations of various statutes following cancellation of real estate contract); *Ruffin v. Nicely*, 183 Fed. App'x 505 (6th Cir. 2006) (alleging various constitutional, statutory, and state-law claims regarding a state refusal to award a grant and contract); *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008) (Rule 8 complaint alleging Equal Pay and Title VII violations); *Brown v. Budz*, 398 F.3d 904 (7th Cir. 2005) (complaint alleging due process violation following beatings by another resident at detention facility); *Al Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (*Bivens* action for violation of, among other things, Fourth and Fifth Amendment rights); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8 (D.C. Cir. 2008) (trademark infringement case).

II. THERE IS NO CONCRETE DIVISION AMONG THE CIRCUITS ON WHAT A PLAINTIFF WHO ALLEGES INTENTIONAL DISCRIMINATION MUST STATE IN HIS RULE 8 COMPLAINT TO SURVIVE A MOTION TO DISMISS.

In the petitioner's view, "the holdings of the Third and Fourth Circuits" are in conflict "with the holdings of the Second, Sixth, Seventh, and the District of Columbia Circuits." Pet. 22. As for the Fourth Circuit's decision in this case, it did not discuss *Swierkiewicz* and would have had no occasion to do so because, as noted above, it was reviewing a § 2254 complaint, not a Rule 8 complaint. The Fourth Circuit in this case neither cited nor discussed *Iqbal, Twombly* or *Swierkiewicz*. Another Fourth Circuit decision, *Jordan v. Alternative Resources Corp.*, 458 F.3d 332 (4th Cir. 2006), cited by the plaintiff in a footnote, Pet. 17 n.10, was decided before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The Fourth Circuit in *Jordan* in no way questioned the continued validity of *Swierkiewicz*. To the contrary, the panel assumed the continuing validity of that decision. 458 F.3d at 345-46.

As to the Third Circuit, that court did include dicta concluding that *Swierkiewicz* was superseded by *Iqbal* and *Twombly*. *See Fowler*, 578 F.3d at 209-11. In *Fowler*, however, the court *reversed* the district court's grant of a motion to dismiss, holding that the complaint was sufficient under Rule 8. *Id.* at 211. The

division in the Circuits that the petitioner posits is thus purely abstract in character. Whether the dicta in *Fowler* about *Swierkiewicz* will survive in future cases is something best left for the Third Circuit to address. Dicta from one court that contravene holdings of other courts hardly constitute the sort of split that should concern this Court.

III. A MOOT CASE DOES NOT MERIT REVIEW BY THIS COURT.

This Court has explained that the "[r]equisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). The plaintiff bears the burden of establishing (1) an injury-in-fact or continuing collateral consequence; (2) an injury fairly traceable to the challenged action or decision; and (3) that it is *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable federal court decision. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The petitioner attacked the conclusion of the Virginia Parole Board that he was ineligible for parole. He was then released on mandatory parole. Of course, there was no point to granting the petitioner a hearing on his parole eligibility, because he was out on parole. The petitioner's claims and the relief he requested all centered on eligibility for parole.

Clearly, that eligibility was no longer an issue once he was released on parole.

The Fourth Circuit's conclusion that the case is not moot is bottomed on the conclusion that a possibility exists that a favorable judgment in Townes's favor, *i.e.* that the Virginia Parole Board was wrong to conclude that he was ineligible for discretionary parole, might prompt the parole board to reduce his time on parole. Pet. App. 10a. The Guidelines of the Virginia Parole Board permit the early termination of parole "if the Board concludes that the parolee's performance while on parole has been exemplary, and that such placement would be in the interest of society and the parolee." Virginia Parole Board Policy Manual 24 (Oct. 1, 2006).[5] As the dissent pointed out, this sort of speculation does not provide the petitioner with any *likelihood* of redress. The petitioner's release on parole rendered his attack on a determination of parole ineligibility moot.[6]

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[5] The manual is available online at: http://www.vadoc.virginia.gov/vpb/manuals/pb-policymanual-1006.pdf.

[6] As the petitioner notes, there is a conflict of authority on this issue. *Compare Burkey v. Marberry*, 556 F.3d 142, 149-50 (3rd Cir.), *cert. denied* 130 S. Ct. 458 (2009) (speculative nature of possibility of reduction of term of supervised probation does not obviate mootness); with *Levine v. Apker*, 455 F.3d 71, 76-77 (2nd Cir. 2006) (possibility that district court might modify term of supervised release precluded dismissal on mootness grounds); *Mujahid v. Daniels*, 413 F.3d 991, 995 (9th Cir. 2005).

IV. THE STATE COURT PROPERLY DISMISSED THE PETITION AS FRIVOLOUS.

The Equal Protection Clause protects persons who are "similarly circumstanced." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). The newspaper article that forms the basis for Townes's assertion of an Equal Protection violation states that Sue Kennon, a "white woman" who was granted parole, committed her robberies using "a broken or a toy pistol." Federal Habeas Pet., Exhibit D. Under *Virginia Code* § 53.1-151(B1), a convict is ineligible for parole if he was convicted of three separate felony offenses of robbery "by the presenting of firearms or other deadly weapon." A toy pistol is not a firearm, nor is a disabled firearm a deadly weapon. It is undisputed that the petitioner employed a real firearm for his robberies. Therefore, the petitioner was not similarly situated to Sue Kennon.

Furthermore, the petitioner must demonstrate that he was treated differently than others similarly situated *and* prove that such treatment resulted from intentional or purposeful discrimination in order to prevail on his equal protection claim. *See, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985). As the court below found, "Townes sets forth *no facts*—indeed no allegations—supporting the contention that the Board intentionally discriminated against him because of his race, let alone that the state court acted unreasonably in rejecting this claim." Pet. App. 18a. Townes only alleges that

the Parole Board's decision "can be seen" as discrimination—he does not allege that the Parole Board actually discriminated against him. These allegations are woefully insufficient to enable Townes to prevail on an equal protection claim.

CONCLUSION

For the reasons stated above, this Court should **DENY** the Petition for Certiorari.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES
Chief Deputy
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

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